

Cennamo v Lee

2011 NY Slip Op 32482(U)

August 9, 2011

Supreme Court, Suffolk County

Docket Number: 10-34638

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 10/13/10 (#001)
MOTION DATE 5/4/11 (#002)
ADJ. DATE 5/19/11
Mot. Seq. #001 - MD
Mot. Seq. #002 - MotD

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BECKI CENNAMO as assignee of B.R.O.
RESTAURANT CORP., and B.R.O.
RESTAURANT CORP.,

Plaintiffs,

- against -

CATHERINE PROSPER LEE, ROSIE'S
COUNTRY DINER, INC., and CRAIG HECHT,
as escrow agent,

Defendants.

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Upon the following papers numbered 1 to 40 read on this motion for permanent injunction; motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14; 15-28; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 29-34; 35-38; Replying Affidavits and supporting papers 39- 40; Other _____; it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiffs for an order granting a permanent injunction awarding them possession of the premises located at 837 Middle Country Road, Middle Island, New York, together with all collateral remaining therein, is denied; and it is further

ORDERED that the motion by the plaintiffs for an order (i) granting leave to amend the summons and complaint to reflect the proper name of defendant Catherine Proper-Lee, and (ii) pursuant to CPLR 3212 granting summary judgment in their favor and against the defendants on the plaintiffs' first cause of action, including an award of attorney's fees, is granted to the extent of (i) granting leave to amend the summons and complaint to reflect the proper name of defendant Catherine Proper-Lee, and (ii) granting partial summary judgment on the issue of liability in favor of plaintiff Becki Cennamo and

against defendant Rosie's Country Diner, Inc. on the plaintiffs' first cause of action, and setting the matter down for a hearing to assess damages against defendant Rosie's Country Diner, Inc. on the plaintiffs' first cause of action as set forth below, and is otherwise denied.

This is an action, *inter alia*, to recover moneys allegedly due on a Promissory Note in the amount of \$40,000.00, executed by defendant Rosie's Country Diner, Inc. in favor of plaintiff B.R.O. Restaurant Corp. on January 15, 2010. Plaintiff Becki Cennamo is the principal and chief executive officer of B.R.O. Restaurant Corp. Defendant Catherine Proper-Lee (s/h/a Catherine Prosper Lee) is the president and sole shareholder of Rosie's Country Diner, Inc.

It is undisputed that the Promissory Note was executed in connection with the purchase and sale of the assets of the plaintiffs' diner, located at 837 Middle Country Road, Middle Island, New York, pursuant to an Agreement of Sale between B.R.O. Restaurant Corp., as seller, and Rosie's Country Diner, Inc., as purchaser, for a price of \$125,000.00. Pursuant to the terms of the Promissory Note, payments in the amount of \$1,235.08 were to be made monthly, commencing on February 15, 2010 and ending on January 15, 2013. Upon execution of the Promissory Note, B.R.O. Restaurant Corp. assigned all of its rights, title, and interest in the Promissory Note to Becki Cennamo. As security for payment of the Promissory Note, Rosie's Country Diner, Inc. executed a Security Agreement providing B.R.O. Restaurant Corp. a security interest in certain collateral located at the premises.

According to the plaintiffs, Rosie's Country Diner, Inc. made only the first three payments due under the Promissory Note, the last payment being received on May 13, 2010. Paragraph 4 of the Promissory Note provides that the holder "may declare the entire unpaid amount of principal and interest . . . to be immediately due and payable" upon failure to make any payment within 10 days after its due date and if such default remains uncured after 15 days' written notice. On June 29, 2010, the plaintiffs sent a letter to the defendants advising them of the default. This action followed.

The plaintiffs allege three causes of action in their complaint: the first, for judgment in the principal amount of \$44,694.76, representing the sum allegedly due under the Promissory Note, the second, for a permanent injunction awarding the plaintiffs possession of the premises and all collateral listed in the Security Agreement, and the third, for an order permitting the release of funds currently held by the escrow agent, defendant Craig Hecht.

Upon the commencement of this action, the plaintiffs moved for a permanent injunction awarding them possession of the premises and all collateral listed in the Security Agreement. In their supporting papers, the plaintiffs noted that, following the default, Catherine Proper-Lee had removed a dishwasher from the premises, and that the defendants had subsequently refused Becki Cennamo entry to the premises to ascertain whether any other items of secured collateral had been removed. Following joinder of issue, the plaintiffs moved, *inter alia*, for summary judgment in their favor and against the defendants on the first cause of action. Both motions are currently *sub judice*.

Addressing first the plaintiffs' request for a permanent injunction, the Court is constrained to deny the application, as it seeks the ultimate relief to which the plaintiffs would be entitled in a final judgment (*see Moore v Ruback's Grove Campers' Assn.*, 85 AD3d 1220, 924 NYS2d 197 [2011]). It

does not appear, in any event, that the defendants have threatened any act “tending to render the judgment ineffectual” (CPLR 6301); the plaintiffs do not contest Catherine Proper-Lee’s claim that the dishwasher, which leaked and had to be placed outside during business hours to accommodate its replacement, was returned inside each evening after the restaurant closed and is currently in possession of the plaintiffs. Additionally, insofar as the motion is essentially one for summary judgment, it is premature, having been made prior to joinder of issue (CPLR 3212 [a]).

The plaintiffs’ request to amend the summons and complaint to reflect the proper name of defendant Catherine Proper-Lee is granted. Where a defendant is misnamed in the summons, an amendment will be permitted under CPLR 305 (c) if the defendant was properly served within the limitations period and if the defendant would not be prejudiced by the amendment (*Achtziger v Fuji Copian Corp.*, 299 AD2d 946, 750 NYS2d 413 [2002], *lv dismissed in part, denied in part* 100 NY2d 548, 762 NYS2d 871 [2003]; *Ober v Rye Town Hilton*, 159 AD2d 16, 557 NYS2d 937 [1990]; Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C305:4). Here, it is evident that Catherine Proper-Lee was properly and timely served—although she raised a jurisdictional objection in her answer, she waived any objection based on improper service when she failed to move within 60 days after service of her answer to dismiss the complaint on that ground (*see* CPLR 3211 [e])—and that she was fairly apprised that she was the party being sued (*see Benware v Schoenborn*, 198 AD2d 710, 604 NYS2d 290 [1993]). Accordingly, the caption of this action is amended to read as follows:

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 BECKI CENNAMO as assignee of B.R.O.
 RESTAURANT CORP., and B.R.O.
 RESTAURANT CORP.,

Plaintiffs,

-against-

CATHERINE PROPER-LEE, ROSIE’S
 COUNTRY DINER, INC., and CRAIG
 HECHT, as escrow agent,

Defendants.

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As to the request for summary judgment, the Court finds that the plaintiffs demonstrated a *prima facie* case of liability by submitting proof of the note and a failure to make payment by its terms (*see Jin Sheng He v Sing Huei Chang*, 83 AD3d 788, 921 NYS2d 128 [2011]). It was incumbent on the defendants, therefore, to submit evidence establishing the existence of a triable issue with respect to a bona fide defense (*see id.*).

In that regard, the defendants claim that the plaintiffs fraudulently induced the defendants to execute the note by concealing significant facts and affirmatively misrepresenting material aspects of the business. In support of their claim, the defendants submit affidavits from three current employees who also worked at the diner prior to the sale of the business. According to their affidavits,

- in December 2009, they were told by Becki Cennamo that certain customers, including Becki's children and their friends, had been invited to eat and drink at the diner for free so that it would appear more crowded at a time when Catherine Proper-Lee would be at the diner observing the flow of business;
- they were told not to disclose to Catherine Proper-Lee the identity of Vincent Cennamo, Becki Cennamo's husband, who was working as a cook at the diner;
- they were told by Becki Cennamo not to fill in the dates on guest checks submitted as orders to the kitchen, and to file false guest checks and ring them up at the register when Catherine Proper-Lee was present and inspecting the premises;
- one of them, to whom Becki Cennamo confided that she was "misleading the potential purchaser," received a phone call every morning during December 2009 and January 2010 advising how many additional receipts she should "ring into the register," and was specifically advised by Becki that she should add an additional \$200 or \$300 to the receipts every day so that the receipts would reflect more business than was actually being conducted; and
- Becki Cennamo threatened to fire them if they disregarded her instructions.

The defendants contend that Becki Cennamo withheld the information concerning the identity of her husband so she could conceal the fact that she was not paying a cook and thereby present lower payroll figures and a higher net profit; that they were compelled to expend an additional \$400 per week to hire a cook to fill the hours previously worked by Vincent Cennamo; and that had they known that Becki Cennamo was padding the daily receipts by \$200 or \$300 per day and that the payroll figures were understated by \$400 per week, they would not have purchased the business.

Paragraph 13 of the Agreement of Sale, which is expressly incorporated by reference into the Promissory Note, provides that "neither the Seller nor any representative or agent of the Seller has made any representation . . . regarding the Assets or the business, or any matter or thing affecting or relating to this agreement, except as specifically set forth in this agreement."

The Court finds the defendants' evidentiary showing deficient. Even to the extent that the plaintiffs may be found to have made misrepresentations which might otherwise support a defense of fraud in the inducement, the defendants cannot demonstrate that they reasonably relied on those misrepresentations to their detriment. While it is generally the rule that only specific language in a disclaimer clause will bar a defense of fraud in the inducement or a defendant's use of parol evidence to


establish its reliance on oral representations allegedly made by a plaintiff (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 184 NYS2d 599 [1959])—and paragraph 13 of the Agreement of Sale concededly does not contain any specific reference to representations by the plaintiffs as to the income, expenses, and profits of the business (*but see Acute Corp. v Stewart*, 21 Misc 3d 1134[A], 875 NYS2d 818 [2008])—the rule also applies in any instance where an express provision in a written contract contradicts the claimed oral representations in a “meaningful” fashion (*Stone v Schultz*, 231 AD2d 707, 647 NYS2d 822 [1996]; *Clanton v Vagianelis*, 187 AD2d 45, 592 NYS2d 139 [1993]; *Bango v Naughton*, 184 AD2d 961, 584 NYS2d 942 [1992]) because, “[i]n such event, the conflict between the provisions of the written contract and the oral representations negates the claim of reliance upon the latter” (*id.* at 963, 584 NYS2d at 944). Here, paragraph 14 (c) of the Agreement of Sale requires the Seller to “give Purchaser and her duly designated representatives reasonable access to . . . the books and records of the Business.” Since the defendants do not claim that they were denied such access or that the information contained in the books and records was falsely presented, an examination of the books and records would presumably have uncovered the falsity of the alleged misrepresentations (*see Clanton v Vagianelis, supra*). Consequently, as it does not appear that the defendants lacked the means available to know the truth regarding the finances (*see Fabozzi v Coppa*, 5 AD3d 722, 774 NYS2d 555 [2004]; *Rudnick v Glendale Sys.*, 222 AD2d 572, 635 NYS2d 657 [1995]; *see also Rodas v Manitaras*, 159 AD2d 341, 552 NYS2d 618 [1990]), they cannot claim reliance on those representations and their defense of fraud of the inducement fails. Additionally, to the extent that the defendants allege fraudulent concealment, it is noted that no duty to disclose exists in the absence of a confidential or fiduciary relationship between the contracting parties (*e.g. George Cohen Agency v Donald S. Perlman Agency*, 114 AD2d 930, 495 NYS2d 408 [1985], *lv denied* 68 NY2d 603, 506 NYS2d 1025 [1986]), and the defendants have offered no proof to establish the existence of such a relationship.

Although the plaintiffs have, therefore, established that Becki Cennamo is entitled to summary judgment on the issue of liability for payment of the amounts allegedly due and owing under the Promissory Note, they have failed to demonstrate any basis to compute or to confirm those amounts. As a question of fact remains on the issue of damages, this matter shall, upon the filing of a note of issue, proceed to a hearing to assess damages against defendant Rosie’s Country Diner, Inc. on the plaintiffs’ first cause of action.

When the note of issue is filed, the plaintiffs shall serve a copy thereof on the Calendar Clerk of this Court, accompanied by a copy of this order with notice of its entry. Upon such service, the Calendar Clerk shall place this matter on the CCP calendar for the next available date.

The Court directs that the cause of action as to which summary judgment was granted is hereby severed and that the parties’ remaining claims shall continue (*see CPLR 3212 [e] [1]*).

Dated: August 9, 2011



 Hon. Joseph Farneti
 Acting Justice Supreme Court

___ FINAL DISPOSITION X NON-FINAL DISPOSITION